

UNITED STATES COURT OF FEDERAL CLAIMS

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U.S. COURT OF
FEDERAL CLAIMS

NEW BREED LEASING CORP.,)

Plaintiff,)

v.)

UNITED STATES,)

Defendant.)

Docket No.: 03-115C

Pages: 1 through 48

Place: Washington, D.C.

Date: January 29, 2003

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ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NEW BREED LEASING CORP.,)
)
 Plaintiff,)
)
v.) Docket No.: 03-115C
)
UNITED STATES,)
)
 Defendant.)

Courtroom 8
National Courts Building
717 Madison Place, N.W.
Washington, D.C.

Wednesday,
January 29, 2003

The parties met, pursuant to notice of the
Court, at 2:02 p.m.

BEFORE: HONORABLE LAWRENCE BASKIR
Judge

APPEARANCES:

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P R O C E E D I N G S

(2:02 p.m.)

THE CLERK: All rise. The United States Court of Federal Claims is now in session, the Honorable Judge Lawrence Baskir presiding.

New Breed Leasing Corporation v. United States, Case No. 03-115C, comes before the Court today on the Plaintiff's motion for preliminary injunction.

THE COURT: Good afternoon, everybody. Please be seated.

ALL: Good afternoon, Your Honor.

THE COURT: Can we start by having counsel identify themselves, please?

MR. DAVIS: Yes, Your Honor. My name is Phillip Davis. I'm with Wiley, Rein & Fielding. I'm counsel of record in this matter.

If the Court please, I would like to introduce counsel at counsel table. This is Phil Harrington of our office, Tim Staley of our office, and Dan Graham of our office, Your Honor.

There's one more person. Mr. Dennis Hunt is in the seats back there. He is a corporate official of New Breed.

THE COURT: Okay. Thank you.

MR. DAVIS: Thank you, Your Honor.

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1 MR. WILLIAMSON: Your Honor, John Williamson
2 representing the United States from the Department of
3 Justice. With me also at counsel's table is Laurie
4 Dym, chief counsel for Commercial Litigation at the
5 United States Postal Service.

6 Also seated in the back of the courtroom is
7 Mr. Keith Strange, who is a vice president with the
8 U.S. Postal Service.

9 MR. GORDON: I am Michael Gordon for APL
10 Logistics, and I'm here with my partner, Donald
11 Holmes.

12 THE COURT: Very good. Thank you. I have a
13 couple of preliminary matters.

14 First, Mr. Gordon, as you probably noticed
15 after you dropped your paper in the box that you
16 forgot to put a title to the paper. The front cover
17 does not identify the nature of the document it
18 covers. Maybe you didn't notice. Take a look at it
19 if you will and just make up a nice title and file a
20 new cover page.

21 We now know what it refers to, but as this
22 thing goes on and on and on there might be lots of
23 filings. We will pick this thing up and say I wonder
24 what this is about.

25 MR. GORDON: I did notice that, and I

1 thought we had put a title page --

2 THE COURT: Not on at least the one that I
3 have.

4 Second matter, I think you all have been
5 pretty diligent in filing redacted public copies, but
6 I'm not sure that everybody has been filing
7 highlighted sealed copies. I think maybe, Mr. Davis,
8 you all may have, but I think the government has not.
9 At any rate, it's important that we know it because we
10 can't tell just from a redacted copy what used to be
11 there, and I think it's important to have it.

12 It's certainly important for the future
13 record, so if you all could file a set, and I think
14 probably it's best to file a complete set of the
15 filings you've already made with the protected
16 materials, the phrases, highlighted.

17 MR. WILLIAMSON: Yes, Your Honor.

18 THE COURT: It's essentially a logistical
19 job. It shouldn't take very long. Maybe we can have
20 that by Monday.

21 MR. WILLIAMSON: Yes, Your Honor.

22 THE COURT: Do you think that would be all
23 right?

24 MR. WILLIAMSON: Yes, of course.

25 THE COURT: I don't want to press you all to

1 run the xerox machine over the weekend, but I think
2 Monday is probably time enough.

3 MR. WILLIAMSON: I think we can get out our
4 highlighters before Monday, Your Honor.

5 THE COURT: And then obviously when you file
6 subsequent papers, you not only have to highlight your
7 own protected material, but the other side's.

8 By that time I think it will be pretty
9 obvious what each side is claiming, but if there's any
10 doubt about it by all means send an advance copy to
11 the other side --

12 MR. WILLIAMSON: Yes, Your Honor.

13 THE COURT: -- so that they can add
14 highlighted versions.

15 We do have a slight difficulty because we're
16 going to now talk about some things, and we may indeed
17 make references to protected material. We have an
18 audience, and I'm not sure who's in the audience. I'm
19 not sure who's been admitted to the Protective Order
20 or not.

21 I think for the first subject or two
22 probably there is no -- never having seen a
23 highlighted copy, I'm totally in the dark as to what
24 you all consider to be protected and not protected,
25 but it seems to me for the first few minutes, at any

1 rate, so far as I can see, there's no need to close
2 the courtroom, and I don't want to close the
3 courtroom.

4 I think maybe for most of what we're talking
5 about there may in fact not be a need to refer
6 explicitly to protected material. I don't know. I
7 know what the prices were, so all you have to do is
8 say APL's price, New Breed's price. You don't have to
9 be explicit about that if that's protected
10 information. Most of the other stuff I'll know by a
11 reference.

12 Let me ask Mr. Davis first. What about this
13 hearing and protected information?

14 MR. DAVIS: Your Honor, you're exactly right
15 in everything you've said. I don't know everybody in
16 the audience either except Mr. Hunt from New Breed.
17 I've informed him that we may well be addressing
18 protected material during the course of this argument,
19 and he well understands that he might have to leave
20 the room --

21 THE COURT: Okay.

22 MR. DAVIS: -- for part of the proceedings.

23 I would tell Your Honor that again I think
24 you're right; that there's going to be a substantial
25 part of this argument where probably protected

1 material is not invoked, but I know from looking at my
2 notes that I will be referring to some protected
3 information or information that I would expect the
4 Postal Service to seem source selection sensitive
5 information, Your Honor.

6 THE COURT: Is that the memorandum, the
7 decision memorandum, the award memorandum? Is that
8 protected?

9 MR. WILLIAMSON: Yes, Your Honor. I'm
10 sorry.

11 MR. DAVIS: That is what I was referring to,
12 Your Honor, and I think there are two other
13 submissions as well.

14 I'll try to be sensitive that when I get to
15 that point I'll try to stop and alert people, and
16 certainly I'd call on counsel to help me in that
17 regard if I seem to be going down a path of protected
18 information with people in the room that shouldn't
19 hear that information.

20 THE COURT: Okay. Mr. Gordon and Mr.
21 Williamson, is it sufficient to leave it to counsel to
22 wave a hand or something else?

23 MR. WILLIAMSON: Yes, Your Honor.

24 MR. GORDON: As long as they're looking at
25 us.

1 THE COURT: Well, we don't have a red flag,
2 do we? Maybe we should get a red flag.

3 Let me also say, by the way, I know
4 attorneys feel uncomfortable addressing the Court
5 without standing, but we're recording this through the
6 microphones, and to the extent that you are polite to
7 that extent it may not be picked up by the
8 microphones, so it's perfectly okay with me --

9 MR. WILLIAMSON: Thank you, Your Honor.

10 THE COURT: -- for you to respond by
11 sitting. For brief exchanges I don't think it's
12 necessary to come to the podium, but if you'd like to
13 come to the podium, of course, then it automatically
14 gets recorded.

15 MR. WILLIAMSON: Thank you, Your Honor.

16 THE COURT: Okay. I think those are all the
17 preliminary matters that I have, so let me ask Mr.
18 Davis. Are there any preliminary matters that you
19 have before we start addressing the question of the
20 injunction?

21 MR. DAVIS: Your Honor, I don't believe so.
22 Thank you.

23 THE COURT: Mr. Williamson?

24 MR. WILLIAMSON: No, Your Honor.

25 THE COURT: Mr. Gordon?

1 MR. GORDON: No, Your Honor.

2 THE COURT: Okay. I have one other
3 preliminary matter, and that has to do with my
4 disappointment that you all have not been able to work
5 out some sort of a voluntary alternative to this
6 injunction proceeding.

7 I hope that I was misled by a reference I
8 think in New Breed's reply that you were negotiating a
9 compromise injunction. I certainly hope you were not
10 negotiating a compromise injunction, but negotiating a
11 compromise alternative to an injunction, and I am
12 disappointed that you could not do that.

13 It does strike me that there is a community
14 of interest on the part of all three parties to
15 address some of the issues that underlie New Breed's
16 concern because to some extent they ought to be shared
17 by the other two parties or shared in another way.

18 It seems to me that, for example, the Postal
19 Service is not served by work force instability over
20 the course of the next few months. It seems to me
21 that APL would be served by having some assurance that
22 to the extent they are interested in hiring New Breed
23 employees they have some assurance that they'll be
24 able to do that.

25 It seems to me there's a sufficient

1 community of interest to work out an agreement,
2 especially since it seems to me uncertainty is the
3 thing that is the most pressing for not only the three
4 parties here, but the fourth unrepresented party,
5 which is to say the work force itself.

6 Not being privy to your discussions or
7 anything else, I could see some sort of an arrangement
8 where, for example, you were explicit, and when I say
9 you I mean APL and the Postal Service, at the kind of
10 transition activities that you wanted to get New Breed
11 to participate in and the timing of it and to see
12 whether you can't let this slip a little bit or that
13 slip a little bit or schedule this in a different
14 circumstance instead of having what comes to mind is
15 APL with banners outside the facilities saying Repent.
16 The time is near. Join APL. You could do something
17 less flagrant than that or whatever the equivalent
18 might be.

19 I'm really disappointed that we have to now
20 come down to what inevitably is going to be a
21 blunderbuss decision by the Court in either granting
22 or not granting it. I'm frankly at a loss to see why
23 you all couldn't do that.

24 MR. DAVIS: Your Honor, if I may? As we
25 explained in our reply memorandum filed last night and

1 as I had intended to discuss this afternoon, we have
2 had discussions, as you know, and New Breed for its
3 part thinks that it went very far down the road.

4 THE COURT: Excuse me for interrupting
5 you --

6 MR. DAVIS: Sure, Your Honor.

7 THE COURT: -- but I've just been sabotaged
8 by the chair, which started off being too high and now
9 almost went too low, but I think we're all right.

10 Okay. I'm sorry.

11 MR. DAVIS: Sorry, Your Honor.

12 THE COURT: I was distracted by the chair.

13 MR. DAVIS: No problem. It's New Breed's
14 view that we went very far down the road in terms of
15 accommodating the Postal Service and APL in what we
16 understand and what we appreciate are certain
17 necessary activities that both those parties need to
18 engage in in order to get an MTESC up and operating.

19 After all, it was New Breed that was, you
20 know, in close partnership I'll say, if you will, Your
21 Honor, with the Postal Service in getting the MTESC
22 program up and operating in the beginning. New Breed
23 is thus very, very sensitive to the activities that
24 need to be undertaken both by the Postal Service and
25 by a new MTESC contractor in order to get a facility

1 up and operating.

2 We made a proposal that we thought would
3 have allowed APL and the Postal Service to undertake
4 the activities that they believed in their discretion
5 they needed to undertake in order to get the facility
6 up and operating.

7 There was a four-part proposal that we made
8 that they could undertake those necessary activities,
9 and we pointed out explicitly that APL could proceed
10 with its lease, that the Postal Service could proceed
11 with reviewing drawings, approving drawings, facility
12 drawings, equipment layout, site plans, parking space
13 plans;

14 That APL could proceed with seeking and
15 submitting to the government authorities, whose
16 approval it apparently needs in order to make site
17 modifications to its proposed facility. We also went
18 so far as to say APL could start construction on its
19 plant if it would like to do that, if the parties
20 thought that that was appropriate.

21 Second of all, Your Honor, what we wanted in
22 return was in the interest of no destabilization of
23 our work force so that we would keep our work force
24 and keep productivity and keep performance ongoing for
25 the Postal Service under our exiting MTEC contract

1 that we would appreciate that the Postal Service not
2 undertake activities that would disrupt our employee
3 work force such as coming into the plant in New
4 Jersey, requesting to make arrangements and discuss
5 the transition to APL, and they've already asked to
6 make those types of visits.

7 Transition is not necessary at this point,
8 Your Honor. There is a contractual provision in our
9 existing contract, which Mr. Hunt addresses in his
10 affidavit submitted as Exhibit P in the reply
11 memorandum.

12 There is a transition plan that is
13 contractually mandated, and that's been approved by
14 the Postal Service, which says the transition
15 activities will indeed start, but they won't really
16 get going until about 30 days before the end of the
17 contract, so there's no need now --

18 THE COURT: Excuse me. Excuse me for
19 interrupting. I did notice the reference by Mr. Hunt
20 to a Transition Plan --

21 MR. DAVIS: Yes, Your Honor.

22 THE COURT: -- initial caps, paragraphs
23 indicated, but I didn't see a copy of such a plan.
24 Did you file such a plan?

25 MR. DAVIS: Your Honor, we did not attach it

1 to the affidavit, thinking that Mr. Hunt's explanation
2 in his affidavit was appropriate. If Your Honor would
3 like it, we could certainly supply it to the Court.

4 THE COURT: There are a number of things
5 that aren't in the record thus far, and we'll get to
6 them I suppose, but that's certainly one of them. You
7 haven't finished.

8 MR. DAVIS: No.

9 THE COURT: I think what you're doing, and I
10 think it's important for these purposes, is you're
11 elaborating on the summary on page 3 of your paper --

12 MR. DAVIS: Yes, Your Honor.

13 THE COURT: -- which looks to be either your
14 revised request, as well as one of your negotiated
15 proposals. Is that correct?

16 MR. DAVIS: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. DAVIS: I mean, that was our offer to --

19 THE COURT: I want to make that explicit, so
20 why don't you continue with that? Then I will address
21 the other two parties.

22 MR. DAVIS: Sure, Your Honor. I'd be happy
23 to do that.

24 THE COURT: I gather that from this it's
25 fairly explicit, I think. It appears to me that

1 paragraph 1 says whatever transition plans APL and the
2 Postal Service feel necessary to do, that's their
3 business.

4 MR. DAVIS: Yes.

5 THE COURT: Number two has to do with New
6 Breed's participation in transition plans.

7 MR. DAVIS: That's correct, Your Honor, with
8 one caveat, if I may.

9 THE COURT: Yes.

10 MR. DAVIS: We would prefer that those
11 activities of Postal in particular not be visible, if
12 you will, or impact our employees directly, such as
13 coming into the facility --

14 THE COURT: Right.

15 MR. DAVIS: -- and wanting to sit down and
16 meet with us regarding transition, wanting to
17 negotiate and discuss and prepare a transition plan or
18 wanting -- another example, Your Honor, which I
19 believe we say in the brief, but I'll certainly recite
20 it here, and Mr. Hunt does in his affidavit. You
21 know, the Postal Service negotiating new or modified
22 truck/trailer or motor carrier contracts for those
23 motor carrier companies that come and deliver MTE
24 right to our docks, to our facilities.

25 The word that those negotiations are ongoing

1 will certainly get to the truck drivers and in turn
2 will get to our employees who interact with the truck
3 drivers on a regular, day-to-day basis. There are 100
4 truck deliveries in and out on a daily basis at the
5 New Jersey MTESC, so we would like the Postal Service
6 to stand down on those negotiations.

7 Mr. Hunt has submitted an affidavit
8 explaining that he's had significant experience
9 negotiating those types of contracts, and they can be
10 done in a matter of weeks, not six months before the
11 contracts need to be switched over to another delivery
12 point.

13 Lastly, Your Honor, if I may, or thirdly, we
14 would request that APL not come and try to hire away
15 our employees. As you say, put the banner, The End Is
16 Near banner, outside our facility and say come to APL.
17 We would prefer them not to come and affirmatively
18 seek to hire away our employees. That can only have a
19 further disruptive impact on our employees.

20 Lastly, Your Honor, I would say that if
21 because of this, that agreed compromise, that
22 compromise, Your Honor, it became necessary or APL was
23 unable as of June 20, the date that New Breed's
24 contract ends, if they were unable by that date to
25 have an up and operating MTESC facility themselves,

1 assuming they went forward, that New Breed would be
2 willing to agree to extend its existing contract
3 beyond the June 20 end date.

4 They would do so not at the current prices
5 of the contract, but at the different prices that were
6 set forth in its December 30, 2002, proposal to the
7 Postal Service here so that there would be no
8 interruption, no disruption of MTESS's services to the
9 Postal Service or in fact to the nation as a whole,
10 Your Honor.

11 THE COURT: Okay.

12 MR. DAVIS: I'm at a loss, Your Honor.
13 Excuse me. I'm at a loss as I sit here today before
14 you as to the reasons why that proposal, that
15 suggestion, was rejected by Postal and by APL.

16 It seems to me it goes very far down the
17 road, if not all the way down the road, to giving
18 Postal and APL virtually carte blanche to do just
19 about anything they believe they need to do in their
20 discretion to go forward with the implementation or
21 the award and implementation of performance of this
22 contract, but at the same time protecting New Breed's
23 I think well recognized interest in not having a
24 destabilized work force and, thus, a drop off in
25 productivity, a drop off in performance.

1 The reason that a drop off in productivity
2 is important, Your Honor, is because under our
3 existing contract there are certain revenue guarantees
4 that the Postal Service gives to us, but we have to
5 meet certain productivity requirements.

6 THE COURT: I think it's very useful for you
7 to put on the record in a narrative form what is on
8 page 3 of your brief at least as a starting point for
9 the discussions I want to have now, as well as the
10 more formal proceeding that will follow or may follow.
11 It's important to know exactly what it is you're
12 proposing now, as opposed to what you originally had
13 proposed.

14 MR. DAVIS: And we are willing to go forward
15 on that basis as we sit here today, Your Honor.

16 MR. WILLIAMSON: Your Honor?

17 THE COURT: Let me say, Mr. Williamson, I
18 know you can't resist putting on the record the good
19 faith, earnest effort you all made as well towards
20 reaching an agreement.

21 I'm prepared to take judicial notice of that
22 fact, but if you feel you must actually articulate it,
23 you certainly may. Then I want to start talking about
24 something more concrete than that.

25 MR. GORDON: Thank you.

1 THE COURT: I think Mr. Williamson has first
2 crack.

3 MR. WILLIAMSON: All right.

4 THE COURT: I'm sorry, Mr. Gordon. You are
5 an intervenor, but just an intervenor.

6 MR. GORDON: I thought I'd be much, much
7 briefer.

8 THE COURT: Than Mr. Williamson? I don't
9 know either of you, so I'm not going to make a
10 decision based upon that yet.

11 MR. GORDON: It was the substance that would
12 be briefer, I think.

13 The reason I wanted to mention the
14 armageddon that I spoke of before is I think if the
15 injunction had been issued on Friday everything that
16 was said would have been true, but at this point with
17 the offer that's been made by APL the harm to us of
18 not being able to enter into a lease and go forward is
19 almost completely gone.

20 THE COURT: Right.

21 MR. GORDON: The particular offer that's
22 being presented in the papers is slightly different
23 than the one that was discussed because there was a
24 sense that we might not be able to hire anyone from
25 APL, as well as potentially solicit them. I thought

1 that would be discriminatory, and I couldn't agree
2 with that.

3 However, I would say this. I don't see why
4 we should be stopped from putting an ad in the paper,
5 for example, and if people come to us and ask us to
6 work why we couldn't interview. That's the only harm
7 I see to us that's still --

8 THE COURT: And that's with respect to
9 paragraph 3?

10 MR. GORDON: Yes. I mean, the words I'm
11 sure try to say what he meant when he said employment
12 initiatives.

13 THE COURT: We'll pursue the meaning of that
14 phrase, but I think without getting down to strict --

15 MR. GORDON: It's not that important to us
16 is what I'm saying.

17 THE COURT: Okay. It's not that important,
18 and I think there may be ways to accomplish that that
19 satisfies not only the three parties here, but the
20 unrepresented fourth party, which is to say the labor
21 force.

22 THE COURT: Mr. Williamson?

23 MR. WILLIAMSON: Yes, Your Honor. I'll
24 start with the labor force because I think that the
25 proposal that New Breed has made does not really

1 address their stated concerns, which are the departure
2 of their work force.

3 If an injunction were entered along the
4 lines, or if we struck an agreement, Your Honor. I
5 would not presume that the parties could agree upon an
6 injunction, but if we were to enter into an agreement
7 along the lines that Mr. Davis had proposed, his
8 initial proposal was not simply that we not put up a
9 banner or allow APL to advertise and actively and
10 affirmatively solicit New Breed's employees, but it
11 would be that APL was completely barred from hiring or
12 communicating in any fashion with New Breed's
13 employees.

14 I think that that actually would be the most
15 disruptive thing because that promotes uncertainty in
16 the New Breed work force. The thing that would
17 promote the most certainty for them, Your Honor, is if
18 they were free to, as they are already doing, continue
19 to send their resumes to APL.

20 There is no requirement or there's no need
21 for APL to actively solicit from these people. By New
22 Breed's own admission in their affidavits, their
23 people are already starting to solicit employment with
24 APL, and I think if New Breed's true concern was
25 preserving their work force over the next few months

1 and, therefore, continuing to do the best possible job
2 for the Postal Service, then the logical thing would
3 be that if employees knew that they could remain with
4 New Breed if New Breed prevails in the bid protest,
5 but if they have the opportunity to speak to APL and
6 get a conditional offer from APL, dependent on what
7 happens with the bid protest, then the employees will
8 know either way they're covered so long as New Breed
9 would not take any sort of action against them for
10 maintaining a conditional offer like that.

11 That way the ones at least who are prepared
12 to go the 35 miles to this new facility would know if
13 New Breed wins we stay with New Breed. If APL wins,
14 then we could go work for them. There would be many
15 fewer departures, in fact, than if an injunction were
16 entered requiring the government and APL to stop
17 performing at all or if we were to enter into an
18 agreement along the lines that have been proposed by
19 Mr. Davis.

20 THE COURT: Mr. Williamson, what you say is
21 really what led me to wonder why you all couldn't come
22 to an agreement.

23 It appears to me that whatever employment
24 insecurity was caused by the award, employment
25 insecurity in New Breed's work force, it at least had

1 a virtue, and that is as of June 20 they would be out
2 of that job, but they had an opportunity to see if APL
3 would hire them, so in terms of as the work force is
4 concerned at least they knew what their choices were.

5 With the protest, their situation is as a
6 practical matter much more confused and uncertain
7 because they don't know which ship to go with. They
8 could choose wrong. They could stay with New Breed
9 and be shut out of APL when that became clear. They
10 could go with APL and be shut out if it turns out that
11 either this matter is not resolved for months or it's
12 resolved in favor of New Breed.

13 MR. WILLIAMSON: But, Your Honor, there's no
14 need for them to make a choice right now because the
15 time to begin performing the contract is three and a
16 half months --

17 THE COURT: I understand that, but there are
18 two things that you must I think acknowledge. First
19 of all, there's an uncertainty on the part of the
20 employees as to where they should go, and there's
21 uncertainty on the part of New Breed as to who will
22 stay and who will go.

23 It seemed to me that from what you said you
24 very clearly had the workings of an agreement. I
25 don't know to what extent APL would like to hire these

1 people, but it seems to me that if the parties came to
2 the work force and said we understand your situation,
3 and this is what we've agreed to do; if you stay with
4 New Breed through this period of time New Breed will
5 recommend and APL will think very seriously or indeed
6 will conditionally hire Ms. Mahoney, Mr. Ferraro and
7 the other people.

8 Right now they don't have any assurances as
9 to where they go, and it just seemed to me as I looked
10 at the situation here, not an unusual situation, that
11 it was to everybody's advantage, especially maybe the
12 Postal Service, as well as the employees, to put some
13 sort of order into this uncertainty, put some sort of
14 certainty into this uncertainty.

15 Certainly Mr. Ferraro and Ms. Mahoney and
16 all the others would feel a whole lot better about
17 working with New Breed if they knew that staying with
18 New Breed until May or June, whatever the date is that
19 you've agreed upon, or mid April, would not jeopardize
20 their carry on employment with APL and that they would
21 have a job one place or the other no matter how this
22 litigation turned out.

23 So I don't really understand why you
24 couldn't come to and still can't come to an agreement
25 that not only puts certainty into the situation of the

1 work force, but certainty into your own work force
2 over this delicate period.

3 MR. WILLIAMSON: The other issue --

4 THE COURT: I want to move also to paragraph
5 2. I don't know what the plans are, but we are in
6 fact as a practical matter talking about two months.
7 The briefing is supposed to be finished by March 7. I
8 cannot imagine a circumstance in which we would go
9 beyond April 1. I'm probably a whole lot closer, so
10 that's essentially two months.

11 I don't know what kinds of transition plans
12 the Postal Service and APL have in mind that would
13 fall within paragraph 2. I don't know what the timing
14 is, and I don't know what arrangements couldn't be
15 made to minimize what appears to be essentially a
16 psychological impact, if not a practical impact, on
17 the work force, but it seems to me you could work it
18 out. I just don't understand what you can't work out.

19 MR. WILLIAMSON: Your Honor, I --

20 THE COURT: Mr. Davis says very little is
21 scheduled in the first two months, but I don't know
22 because neither the government nor APL nor New Breed
23 favored the Court with the schedule of transition
24 activities that might or might not be covered by
25 paragraph 2.

1 MR. DAVIS: I think you're right, Your
2 Honor. By the way, Your Honor, I appreciate your
3 guidance on this and your involvement in helping the
4 parties reach an agreement if that's your desire. I
5 welcome it and New Breed does.

6 Our view is that nothing needs to occur now.
7 Nothing really needs to occur until the anticipated
8 April 1 date of the decision on this matter on the
9 merits, Your Honor.

10 THE COURT: I understand that your position
11 is that nothing needs to, but it would certainly help
12 me before I made that determination to know what was
13 planned, what kinds of participation the Postal
14 Service and APL think they need over the course of the
15 succeeding two months that either intrudes upon New
16 Breed's activities, which is one thing, or has an
17 aggravated psychological impact on the work force, a
18 much less tangible kind of concern.

19 I don't know what you have in mind. I don't
20 know that you couldn't do it another way. Couldn't it
21 flip a week or two weeks, whatever the schedule is?

22 MR. DAVIS: And New Breed doesn't know as
23 well. We're concerned with the reaction that we've
24 already had from our employees.

25 THE COURT: I, frankly, would hate to go

1 through a formal hearing or formal decision making
2 process with respect to paragraph 2 to find out there
3 was no reality behind it.

4 MR. WILLIAMSON: Your Honor, I am probably
5 not best qualified to give you the week by week
6 schedule, but, as I understand it from consultations
7 with the Postal Service, there are activities,
8 transition plans, that they would like to embark upon
9 before --

10 THE COURT: Covered by paragraph 2?

11 MR. WILLIAMSON: Yes, Your Honor. I think
12 the principal difficulty or the principal concern that
13 we had, Your Honor, is that we did not want to spend
14 the next two months or six weeks devoting the parties'
15 and the Court's resources to trying to police an
16 agreement when the Postal Service employees are at New
17 Breed's facility daily.

18 If the Postal Service is required not to
19 talk about certain activities and not engage in
20 certain activities, we think that could be a very
21 difficult --

22 THE COURT: So you've answered one question
23 that was not answered in the papers. My question was
24 how often are Postal employees there.

25 I suspected Postal employees, officials,

1 were there quite regularly, if not daily. Now you're
2 telling me daily, right?

3 MR. WILLIAMSON: That's my understanding.

4 THE COURT: So the real question is what do
5 they say behind closed doors and to whom.

6 MR. WILLIAMSON: Yes, Your Honor, but there
7 are Postal employees on site on a regular basis. They
8 are there for operational purposes.

9 THE COURT: I understand that.

10 MR. WILLIAMSON: They are there for quality
11 control, productivity monitoring, et cetera. They are
12 not there -- well, I am speaking a little bit beyond
13 my pay grade here too as well, Your Honor, because I
14 would represent to the Court that I would doubt that
15 the people that are there on a regular daily basis to
16 make sure the contract is performed are going to have
17 much, if anything, to do with transition plans that
18 are being proposed.

19 THE COURT: We're talking about symbolism
20 and visibility. I don't know. Maybe Ms. Dym or maybe
21 Mr. Williamson can enlighten the Court as to how often
22 Postal officials appear because Postal officials come
23 on the scene as a regular matter. It's not unusual
24 that they'd be coming on the scene next Tuesday.

25 The fact that they're on the scene shouldn't

1 affect anybody at all. What might conceivably affect
2 people is what they're talking about. Well, there's
3 no reason why the work force on the floor needs to
4 know what they're talking about.

5 Then you've sliced this thing even thinner.
6 Now you're talking about what's the impact on the
7 managers of talking about transition. That's a
8 totally different kind of question. There are what,
9 four managers?

10 MR. WILLIAMSON: I'm going to say a half
11 dozen.

12 THE COURT: Half dozen?

13 MR. WILLIAMSON: Six or seven or eight, Your
14 Honor.

15 THE COURT: All right. Half a dozen
16 managers.

17 MR. GORDON: Your Honor, I think what you
18 suggested earlier that if the presentation was made
19 that people could choose where they wanted to go and
20 wouldn't lose their job and had options, what
21 difference does it make what the Postal Service is
22 doing? The same facts are going to occur.

23 The protest will be decided by a specific
24 period of time, and the people will have really the
25 honest assurance that they can actually have

1 regardless of moods and, you know, signs and things
2 like that, but obvious answers.

3 The protest will be decided by April. You
4 have options to do what you want as to where you want
5 to work. You can work here. You can apply anywhere
6 you want to. The decision will be made by the Court
7 at that time, and you now make your decision as an
8 adult. Where do you want to work?

9 THE COURT: Let me ask, Mr. Gordon, this
10 point blank question. Do you have an interest in
11 having the managers work for you?

12 MR. GORDON: From my understanding from my
13 client, we are not dependent on hiring any of the
14 people.

15 THE COURT: I understand that.

16 MR. GORDON: We've agreed. What we've said
17 we'd do is basically entertain their applications. I
18 really think if we didn't get any it wouldn't make a
19 difference.

20 THE COURT: I'm not asking you to make a
21 commitment as to the success of your enterprise
22 turning on this thing. I just want to know whether --

23 MR. GORDON: If any of these people are
24 qualified, my client said they'll interview them and
25 hire them if they're qualified.

1 THE COURT: Well, it appeared to me that it
2 might be possible to have an agreement between the two
3 entities in which the managers agree to stay on over
4 the course of this transition period and then in
5 return for that, not going anywhere else, as well as
6 not going to APL, New Breed would, if the protest
7 failed, recommend that APL hire Mr. Ferraro and Ms.
8 Mahoney and whomever else it is.

9 For its part, APL would say we would not
10 hire and take away during this interim period any of
11 those managers, but we would entertain very, very
12 sympathetically recommendations by New Breed for
13 hiring.

14 The advantage, it seems to me, to both sides
15 is you have certainty in terms of the transition, and
16 the supreme advantage to the employees is as long as
17 they don't walk out the door to a third party, which
18 is just as bad for New Breed, as long as they don't do
19 that they have as close as you could get to a follow
20 on employment.

21 Now, I don't know why you all couldn't work
22 out some sort of arrangement like that that
23 satisfies --

24 MR. GORDON: That is not offensive to me as
25 long as we have the option to hire them and evaluate

1 them on their merits. That's what we proposed.

2 THE COURT: Now, I would think that the
3 Postal Service would be much in favor of on the one
4 hand not having New Breed's service deteriorate during
5 the transition period by having stability in the work
6 force over time --

7 MR. WILLIAMSON: Yes, Your Honor.

8 THE COURT: -- and having a start up as
9 smooth as possible with experienced personnel when the
10 hand over actually began to occur.

11 MR. WILLIAMSON: Yes, Your Honor, but I do
12 want to echo Mr. Gordon's comments that the Postal
13 Service did not choose APL presuming that it would be
14 necessary --

15 THE COURT: No. I fully understand.

16 MR. WILLIAMSON: Okay.

17 THE COURT: I fully understand that.

18 MR. WILLIAMSON: Thank you.

19 THE COURT: You know, it's not what turns
20 APL's success on, but there is an advantage to APL
21 presumably in having experience period if they want to
22 come do it. They're not obligated to hire anybody.

23 I don't think they make any concessions of
24 any sort, symbolic or otherwise, by doing this. I
25 don't think New Breed loses anything by this either.

1 We are in fact talking about two months, and we're
2 talking about not having a blunderbuss of an
3 injunction that would probably be not satisfactory to
4 any of the parties. I don't know how one would
5 monitor or police it, but it would have to be policed.

6 I don't know about paragraph 3. Does an
7 advertisement in the Burton Record constitute a
8 violation of No. 3 or a billboard half a mile down the
9 road? I don't want to get into that sort of stuff.
10 I'm not even sure it's --

11 MR. WILLIAMSON: Your Honor, if we do strike
12 an agreement that is not memorialized in an injunction
13 then how do the parties ensure compliance with it?

14 THE COURT: I hate to raise this as
15 relevancy, but how about good faith? I guess what I
16 would do is I would revisit this question if it turned
17 out that you couldn't do it, but I don't think this is
18 very complicated.

19 It's a whole lot easier to submit a bid
20 under this RFP than it is to work out a couple
21 paragraphs with the Postal Service, I think since you
22 have an interest in having this agreement, helping the
23 two sides work out to some certainty.

24 MR. DAVIS: Your Honor, I didn't mean to
25 interrupt if you were --

1 THE COURT: No. Go ahead.

2 MR. DAVIS: May I suggest that you have
3 presented a number of ideas, which I thank you for,
4 that perhaps we have not fully considered in our past
5 discussions.

6 I would suggest or respectfully suggest that
7 perhaps maybe not an adjourning, but a recess be taken
8 of this argument so that we could confer with our
9 client and, you know, the Postal Service and APL with
10 its client. Perhaps we could talk and report back to
11 the Court maybe even later on this afternoon as to
12 whether we've reached an agreement or not or whether
13 we need to proceed with the argument on the
14 injunction.

15 Certainly New Breed would be willing to do
16 that. I need to talk with New Breed, Mr. Hunt in
17 particular who's here happily. His presence will
18 hopefully advance this and get his reaction to some of
19 the ideas you've suggested, Your Honor.

20 THE COURT: Well, I think that Ms. Mahoney
21 and Mr. Ferraro would certainly be happy to find out
22 that these uncertainties were eliminated.

23 MR. DAVIS: I understand.

24 THE COURT: Do you think there's anything
25 here to talk further about, Mr. Williamson and Mr.

1 Gordon? I gather from Mr. Gordon that answer might be
2 yes, correct?

3 MR. GORDON: As far as I'm concerned,
4 there's not that much more to talk about for APL's
5 concern. We're happy to entertain applications. The
6 people would not be likely hired until after the Court
7 issued its decision, so I don't see what --

8 THE COURT: Well, that in itself might be
9 the product of a letter exchange.

10 MR. GORDON: Yes. That would not be a
11 problem for us.

12 THE COURT: That's a different kind of
13 solution, but it would be a solution certainly for two
14 months, and I would think that anything that the two
15 parties thought would make their life easier the
16 Postal Service would be in favor of also, but, Mr.
17 Williamson, I shouldn't speak for you.

18 MR. WILLIAMSON: Thank you, Your Honor. We
19 would certainly be willing to resume our discussions
20 with Mr. Davis.

21 One of the subjects we haven't addressed is
22 the point concerning discussions reaching the
23 contractors, other contractors who were operating on
24 the site. New Breed says that they have a concern
25 that those people will agitate their employees and

1 drive away --

2 THE COURT: Yes, but that disappears if
3 you've worked out an agreement with respect to the
4 existing work force. Then you don't have to worry
5 about aggravations because the people know that an
6 agreement has been reached between APL and New Breed
7 for continuity of employment irrespective of whichever
8 outcome --

9 MR. WILLIAMSON: Yes.

10 THE COURT: -- of the protest, so what the
11 truck drivers say over a beer -- maybe they shouldn't
12 be saying it over a beer, but --

13 MR. WILLIAMSON: Let's hope not. Not at the
14 plant.

15 THE COURT: Over coffee is not going to
16 affect the work force, so I think that goes out the
17 window if the parties can come to an agreement.

18 MR. DAVIS: If we agreed to some of the
19 other things.

20 THE COURT: One of the questions is is there
21 enough here to warrant a recess? I wouldn't do it for
22 the rest of the day because I don't want to press you
23 all.

24 MR. GORDON: I guess the answer --

25 THE COURT: Over the next few days, you're

1 either going to come to some agreement or not come to
2 some agreement.

3 MR. GORDON: It would seem to me that if New
4 Breed gets an assurance that its people will be
5 considered by us, you know, sometime after April when
6 the Court issues its decision, I don't really know why
7 the other cosmic signs of how things are going matter.

8 I mean, I don't see why they can't just sort
9 of withdraw those and let the process just take their
10 course as long as the employees have a sense that
11 they'll be considered fairly by us, as well as by
12 them.

13 THE COURT: Well, I think what I'm concerned
14 about is a document that memorializes that
15 presentation, but also something that the two parties
16 can show the work force --

17 MR. DAVIS: I understand.

18 THE COURT: -- for their sake as well as New
19 Breed's sake.

20 MR. GORDON: So in that sense I'm sure Mr.
21 Davis needs to talk to his client for a few minutes,
22 and I'm sure Postal has to decide for themselves.
23 They're the government.

24 THE COURT: Well, what I want to find out,
25 and I think I have from Mr. Gordon, but I want to find

1 out from Mr. Williamson. Do you think there's enough
2 possibility of coming to some sort of an accommodation
3 that it's worth taking a recess to explore it further?

4 MR. WILLIAMSON: I believe so, but I do just
5 want to clarify.

6 Mr. Davis, is it your position that you
7 would be willing to consider APL's proposal, or are
8 you saying yes, we will do that? You want to consult
9 with New Breed.

10 MR. DAVIS: Your Honor, I need to consult
11 with my client on all of these matters. That's not
12 the only idea that's been floated out here. Your
13 Honor had a number of ideas. We've all been listening
14 to them intently, and I think we need to share those
15 ideas respectively on our own sides of the table.

16 THE COURT: I won't offer myself up as a
17 mediator because I don't believe that decisional
18 judges should also be settlement judges. I don't know
19 that this is the kind of thing that needs outside help
20 because I, frankly, don't think that it's that
21 difficult to come to some sort of an accommodation,
22 but if there is a need for it I'll get one of my
23 colleagues to join in.

24 The Court, of course, has its own selfish
25 interests here, and that is I don't want to listen to

1 you all for three hours. I don't want to have an
2 evidentiary hearing, and I don't want to consider how
3 to frame if I decide to frame an equitable injunction.

4 MR. DAVIS: We won't take that personally,
5 Your Honor.

6 THE COURT: It can be inequitable, but this
7 I would hope would be an equitable injunction, so I
8 have an interest also in having you all see if you
9 can't reduce this to a letter or memorandum of
10 understanding or something like that.

11 I think what I would like to do is give a
12 recess and either come back -- Friday is not good.
13 Why don't you advise me between now and Friday of
14 whether or not you can come to an agreement, and in
15 the event you can't come to an agreement I think I
16 would probably look at Monday, 10:00, and we'll get a
17 little more formal.

18 Let me ask Mr. Baker. Okay? That seems to
19 be okay.

20 In the interim we're going to have a filing
21 of the administrative record.

22 MR. WILLIAMSON: Yes, Your Honor, on Friday.

23 THE COURT: I hope that that would include
24 and I'd like to insure that that includes the existing
25 contract that New Breed has at least insofar as it

1 makes provision or doesn't make provision for
2 transition obligations, the transition plan that Mr.
3 Hunt referred.

4 I'd like to have a schedule of the
5 transition activities that might be encompassed by
6 paragraph 2 and the timing insofar as the Postal
7 Service is concerned or APL is concerned with respect
8 to each of those events.

9 MR. WILLIAMSON: Yes, Your Honor.

10 THE COURT: It can be a scrub list. I mean,
11 if you take a look at it and you decide well, this can
12 happen on April 2, you don't have to include it in the
13 list. You can scrub the list.

14 MR. WILLIAMSON: Okay. Just to clarify,
15 Your Honor, are you asking for an existing transition
16 plan?

17 THE COURT: Well, the one that Mr. Hunt
18 referred to --

19 MR. WILLIAMSON: Okay. Yes.

20 THE COURT: -- was an existing plan. I
21 think what I'm looking for now is what kinds of
22 activities does the Postal Service contemplate that
23 would be affected by paragraph 2 or encompassed by
24 paragraph 2.

25 MR. WILLIAMSON: And I just want to clarify

1 that you're asking for existing documents that address
2 that?

3 THE COURT: No, no. If you're prepared to
4 modify that, you can just send a memorandum.

5 MR. WILLIAMSON: Okay.

6 THE COURT: These are the eight things we
7 want to do, and these are the dates we need to do it
8 or we wish to do it. As I say, it's a scrub list so
9 it does include things that you could, if I pressed
10 you, say sure, I'll do that in May.

11 MR. WILLIAMSON: But this will be part of
12 the administrative record, correct, Your Honor, or
13 this will be a separate submission?

14 THE COURT: Or a supplement to it or
15 whatever it is. I see it as necessary for the
16 injunction if it comes to that, but I don't know that
17 it becomes necessary for the merits.

18 MR. DAVIS: Your Honor, I would see that as
19 necessary for purposes of the discussions we're going
20 to be having over the next couple of days.

21 THE COURT: Okay. That's why I would assume
22 that you all will be talking about it together --

23 MR. DAVIS: Yes.

24 THE COURT: -- to see what kinds of
25 arrangements might be necessary or not. It might be

1 obviated by another approach.

2 In any event, if we have to come back to a
3 consideration, a formal consideration of an
4 injunction, I want to see exactly what it is that's
5 covered by paragraph 2.

6 MR. WILLIAMSON: All right. And Your Honor
7 would like that submitted Friday because we're coming
8 back Monday in the event --

9 THE COURT: In the event, yes. I think you
10 have to give me a little bit of time to look at it.

11 MR. WILLIAMSON: I understand.

12 THE COURT: If it's Friday close of
13 business, there's not a lot of time between Monday at
14 10:00.

15 MR. WILLIAMSON: No. Friday.

16 THE COURT: Fax it over the weekend, okay?

17 MR. WILLIAMSON: Okay. Well, I'm not
18 presuming that we necessarily will need to do that,
19 Your Honor.

20 THE COURT: No. I expect Mr. Baker will not
21 have to sit by the fax machine all day Sunday. He'd
22 appreciate that, too.

23 Is there anything else we need to talk
24 about?

25 MR. GORDON: Your Honor, I think we have a

1 little concern. Probably I'm speaking out of turn,
2 but just from comments I've heard offhand on the
3 Protective Order and filing of redacted copies with
4 the Court.

5 Is there any way that we could file the
6 redacted copies say, for example, the day after the
7 actual briefs are filed, something like that?

8 THE COURT: You're talking about future
9 filings?

10 MR. GORDON: Yes.

11 MR. WILLIAMSON: Yes, sir.

12 THE COURT: That is a problem, and I think
13 that it says contemporaneous with.

14 MR. WILLIAMSON: It is, Your Honor.

15 THE COURT: I think that was intended to
16 give you a little bit of flexibility.

17 MR. WILLIAMSON: Yes, Your Honor.

18 THE COURT: You know, this process should
19 not take very long, and there shouldn't be anything
20 else so if you do it the day before. You know, you
21 finish your brief the day before and send it over in
22 time for the other side to get it back.

23 MR. GORDON: What lawyers finish their
24 briefs the day before?

25 THE COURT: I understand. I've had this in

1 almost every case in which a Protective Order has been
2 filed as to where to do it. If you want to add a day,
3 we'll informally add a day to every time, to every due
4 date. Rather than take a day off your schedule, we'll
5 add a day for an exchange of documents.

6 MR. WILLIAMSON: Your Honor, effectively
7 that's what we did. That's what the government did
8 when it filed its brief Monday night was then the
9 first thing Tuesday morning I called Mr. Davis and Mr.
10 Gordon and said do you have any problems with our
11 redactions. They made an initial review and did not
12 have, but I think --

13 THE COURT: I suspect there's not going to
14 be any difficulty. All will recognize it.

15 I should add I guess with respect to the
16 administrative record that that we'll seal just
17 because it gets to be too difficult to redact and
18 highlight different portions, so we don't have to
19 worry about the administrative record itself at least
20 in the initial instance.

21 Let me ask just for my knowledge. The award
22 memorandum is something the government would like to
23 keep confidential. Is that correct?

24 MR. WILLIAMSON: Your Honor, I would have to
25 discuss that with the Postal Service.

1 THE COURT: Okay.

2 MR. WILLIAMSON: I think our principal
3 concern is APL and New Breed, you know, the different
4 bidders.

5 THE COURT: The actual proposals. Am I
6 correct that the D.C. Circuit's rule is that the
7 proposal of the winning bidder is not covered by
8 Freedom of Information Act?

9 MR. GORDON: But there's proprietary data,
10 and there's the Trade Secrets Act that protects the
11 winning bidder's proposal for technical or --

12 THE COURT: Some portions of it.

13 MR. GORDON: And particularly in this case
14 where the other side is asking essentially to reopen
15 things and potentially who knows what. I think
16 typically these kinds of things just aren't disclosed.

17 THE COURT: Well, I'm not talking about
18 interim disposal. I'm talking about end of the case.

19 MR. GORDON: And decision?

20 THE COURT: Yes. Well, that and appeal.
21 Right.

22 MR. GORDON: One of the problems I think
23 from my client's point of view, and I'm sure from
24 theirs, is we compete with each other on a lot of
25 things, and a lot of similar things are probably in

1 each others' proposals that are not shared by the
2 others.

3 THE COURT: I suspected that was the case.
4 I've had other experiences where that has become
5 important. Okay. I didn't mean to start a whole new
6 subject.

7 I want to thank you all very much for your
8 receptiveness to this, and I hope to hear
9 affirmatively from you within the next few days.

10 MR. DAVIS: Thank you, Your Honor.

11 THE COURT: I hope I don't see you on
12 monday.

13 MR. WILLIAMSON: Thank you, Your Honor.

14 THE COURT: Thank you all very much. We're
15 adjourned.

16 (Whereupon, at 2:53 p.m the hearing in the
17 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: 03-115C
CASE TITLE: New Breed Leasing Corp. v. U.S.
HEARING DATE: January 29, 2003
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Court of Federal Claims.

Date: January 29, 2003


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